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Robert A. Wilson

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Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations

I. INTRODUCTION

A fundamental principle of international law is that members of diplomatic missions are shielded from legal process.¹ This “shield”—diplomatic immunity—is broadly defined as “the freedom from local jurisdiction accorded under international law by the receiving state to [foreign diplomats and to] the families and servants of such officers.”² A common misconception is that diplomatic privileges and immunities confer a license to commit wrongs.³ This Comment will demonstrate that diplomatic immunity from criminal and police jurisdiction, although subject to abuse, does not entitle diplomats to violate domestic laws, but is, instead, an essential element of effective international relations.

Specifically, this Comment will trace the doctrine of diplomatic immunity from its incorporation into United States statutory law in 1790,⁴ to its uniform international treatment in the Vienna Convention on Diplomatic Relations in 1961,⁵ and finally to its recent codi-

1. Comment, *A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978*, 54 TUL. L. REV. 661, 662 (1980) [hereinafter cited as *New Regime*].

2. LIBRARY OF CONGRESS, HISTORY OF THE CONCEPT OF DIPLOMATIC IMMUNITY, reprinted in Report on Legislative History of the Diplomatic Relations, 96th Cong., 1st Sess. 12 (1979).

3. William Macomber, United States ambassador to Turkey, observed that “[d]iplomatic immunity is not license [to commit a wrong] and those who use it as such abuse the hospitality which has been extended to them (and) strain rather than improve relations.” Turan, *The Devilish Demands of Diplomatic Immunity*, Wash. Post, Jan. 11, 1976, at 20 (Potomac Section), col. 1; Turan continues: “[t]he hard facts remain that abuse of the privilege is an all-too-common fact of life.” *Id.* See also Gupte, *Privileges for Diplomats in U.S. Stir Resentment and May Be Curbed*, N.Y. Times, July 18, 1978, § II, at B8, col. 4.

4. Act of April 30, 1790, ch. 9, §§ 25-27, 1 Stat. 112, 117-18 (amended by 22 U.S.C. §§ 252-254 (1976) (repealed 1978)).

5. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95. As of December 31, 1977, 127 states had deposited instruments of ratification of or accession to the Vienna Convention with the United Nations Secretary General. United Nations Multilateral Treaties: List of Signatures, Ratifications, Accessions as of 31 Dec. 1977, U.N. Doc. ST/LEG/SER. D/11 51 (1977). The United States ratified the Vienna Convention on September 14, 1965; the ratification was deposited on November 13, 1972; and the Vienna Convention was entered into force in the United

fication in the Diplomatic Relations Act of 1978.⁶ Special emphasis will be placed upon the scope of immunity from criminal prosecution and the class of diplomats who are entitled to receive it. Finally, the changing nature of diplomatic immunity and the sanctions which constrain diplomatic representatives to abide by local laws will be analyzed.

II. THE THEORIES UNDERLYING DIPLOMATIC IMMUNITY

Any comprehensive analysis of diplomatic immunity must include a discussion of its underlying theories. Diplomatic immunity is among the most ancient doctrines of international law.⁷ Extending specific rights to representatives of other countries in periods of peace and war has long been essential to facilitate international relations.⁸ Legal scholars have offered several theories to justify diplomatic privileges and immunities. Most prominent are the following theories: (1) personal representation; (2) extraterritoriality; and (3) functional necessity.⁹

A. Personal Representation

The personal representation theory enjoyed its greatest popularity during the eighteenth and nineteenth centuries.¹⁰ Under the personal representation theory, the diplomat assumes the role of the head of the sending state or of the sovereign power of that state.¹¹ Because the diplomat is the "alter ego" of his ruler,¹² he enjoys the

States on December 13, 1972. The United States Senate's ratification appears at 111 CONG. REC. 23, 773 (1965).

6. Diplomatic Relations Act, Pub. L. No. 95-393, 92 Stat. 808 (1978) (codified at 22 U.S.C. § 254, 28 U.S.C. § 1364). The Act became effective on December 29, 1978, 90 days after its enactment on September 30, 1978. For a brief presidential statement on the signing, see 14 WEEKLY COM. PRES. DOC. 1694 (Oct. 2, 1978).

7. Preface to C. WILSON, *DIPLOMATIC PRIVILEGES AND IMMUNITIES* at vii (1967).

8. *Id.* at 1.

9. *Id.* See also M. OGDON, *JURIDICAL BASES OF DIPLOMATIC IMMUNITY* 63-194 (1936) (discusses and analyzes in detail the development and status of these three theories).

10. Note, *The Diplomatic Relations Act of 1978 and Its Consequences*, 19 VA. J. INT'L L. 131, 132 (1978) [hereinafter cited as *Consequences*].

11. G. SCHWARZENBERGER & E. BROWN, *A MANUAL OF INTERNATIONAL LAW* 79 (6th ed. 1976).

12. *Bergman v. De Sieyes*, 71 F. Supp. 334, 341 (S.D.N.Y. 1946), *aff'd*, 170 F.2d 360 (2d Cir. 1948). In *Bergman*, a French diplomat on his way to his position in Bolivia was served process while in New York. The court held that the diplomat was entitled to the same privileges while en route to the country in which he was accredited, as he would have if he were a diplomatic resident of the United States. The court stated:

[A] foreign minister is immune from the jurisdiction, both criminal and civil, of the

rights and privileges which would be accorded his master by the receiving state.¹³ The rationale for the personal representation theory was best expressed by Chief Justice Marshall in *The Schooner Exchange v. M'Faddon*: "The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad."¹⁴

Personal representation has been criticized, however, as being "altogether too wide and too fallacious for the business of conducting international business."¹⁵ The two major criticisms of this theory are: (1) placing a diplomat entirely beyond the law of a host state merely because he personifies his sovereign defines too broadly the scope of that diplomat's rights;¹⁶ and (2) the concept of "personal representation" is difficult to apply to modern systems of government.¹⁷ In a monarchy, for example, a diplomat would assume the role of his king. In a democratic form of government such as the United States, where sovereign power is divided among executive, legislative and judicial branches, however, it is difficult to ascertain exactly whose authority the diplomat represents.¹⁸

courts in the country to which he is accredited, on the grounds that he is the representative, the alter ego, of his sovereign who is, of course, entitled to such immunity, and that subjection to the jurisdiction of the courts would interfere with the performance of his duties as such minister. . . .

13. In *Holbrook v. Henderson*, 4 Sand. Ch. 619, 628 (1839) the court stated that "[t]he respect rendered the minister is not personal, merely, but is in truth, the respect due from one sovereign to another"

14. 11 U.S. (7 Cranch) 116, 138 (1812) (a French warship was not subject to admiralty jurisdiction in the United States, even though the vessel was in United States territorial waters).

15. RIEFF, *DIPLOMATIC AND CONSULAR PRIVILEGES, IMMUNITIES, AND PRACTICE* 26 (1954).

16. Note, *Terrorist Kidnapping of Diplomatic Personnel*, 5 CORNELL INT'L L.J. 189, 198 (1972) [hereinafter cited as *Diplomatic Personnel*]. Commentators tend to agree that the primary purpose of diplomatic immunity is to facilitate international discourse. Therefore, the scope of such immunity should be narrowly drawn to govern activities promoting this specific purpose rather than extended in blanket fashion to cover all of the diplomat's activities in the receiving state. In applying "blanket" immunity to personal representatives of the sovereign state, however, the personal representation theory fails to limit the scope of diplomatic immunity adequately.

17. *Id.* C. WILSON, *supra* note 7, at 4.

18. *Id.* The personal representation theory assumes that the diplomat personifies the supreme authority of the sending state. In a democratic state, however, supreme authority is not vested in one individual or a small group, but rather in separate and distinct branches. Therefore, this would result in individuals representing various groups of only limited authority in direct contradiction to the theory's premise of the diplomat personifying the

B. Extraterritoriality

Extraterritoriality is another theory employed during the eighteenth and nineteenth centuries to justify diplomatic immunity.¹⁹ Under this theory, a diplomat is treated as if he were still living in the sending state,²⁰ and the premises of the diplomat's mission are treated as an extension of that state's territory.²¹ Thus, extraterritoriality suggests that a host state may neither enter, nor subject to legal process, real property held by another state.²² Moreover, a host state lacks personal jurisdiction over the diplomat and therefore cannot compel him to appear in its courts.²³ A judicial interpretation of this theory appeared in *Wilson v. Blanco*,²⁴ an 1889 New York Supreme Court case. There, the court stated that the rule of international law "derives support from the *legal fiction* that an ambassador is not an inhabitant of the country to which he is accredited, but of the country of his origin, and whose sovereign he represents, and within whose territory he, in contemplation of law, always abides."²⁵

The theory of extraterritoriality has been widely criticized.²⁶

supreme authority. "It might now be asked: the ambassador is the personification of whom?" *Id.*

19. *Consequences*, *supra* note 10, at 132.

20. See D. MICHAELS, INTERNATIONAL PRIVILEGES AND IMMUNITIES 47 (1971).

21. Z.H. GROTIUS, 2 DE JURE BELLI ET PACIS 202 (W. Whewell trans. 1853). See also G. SCHWARZENBERGER & E. BROWN, *supra* note 11, at 81.

22. See G. SCHWARZENBERGER & E. BROWN, *supra* note 11 at 80-81. Consider the situation of Jozsef Cardinal Mindszenty, the Catholic Primate of Hungary, a fervent anti-communist, who, to escape imprisonment, resided safely for many years in the United States embassy in Budapest. *Mindszenty Leaves Hungary, Goes to Rome*, N.Y. Times, Sept. 29, 1971, at 1, col. 6.

23. Z.H. GROTIUS, *supra* note 21; see also Barnes, *Diplomatic Immunity from Local Jurisdiction: Its Historical Development under International Law and Application in United States Practice*, 43 DEP'T ST. BULL. 173, 175 (1960).

24. 56 N.Y. Sup. Ct. 582, 4 N.Y.S. 714 (1889).

25. *Id.* at 582, 4 N.Y.S. at 714 (emphasis added). Similar judicial interpretations of the theory are found in *The King v. Guerchy*, 1 Black. W. 545, 96 Eng. Rep. 315 (1765) (an ambassador is not subject to the courts of the country to which he is sent but is believed, by legal fiction, to still be a resident of his own country); *Taylor v. Best*, 14 C.B. 487, 517, 139 Eng. Rep. 201, 213 (1854) ("The foundation of the privilege[—exemption from the jurisdiction of the English courts—]is, that the ambassador is supposed to be in the country of his master"); *Attorney General v. Kent*, 1 H. & C. 12, 23, 158 Eng. Rep. 782, 786 (1862) (diplomatic immunity is based upon the principle that "an ambassador is deemed to be resident in the country by which he is accredited").

26. See M. OGDON, JURIDICAL BASES OF DIPLOMATIC IMMUNITY 94 (1936), where the author states that the "recent and current trend [as of the 1930's] is conclusively in favor of repudiating the extra-territorial concept in every form." See also 2 C. HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1266 (2d rev. ed. 1947) (refers to a "complete abandonment" of the theory); *Ambassadors and Consuls* —

First, because the term "extraterritoriality" is subject to many different meanings,²⁷ the term itself does not provide adequate guidelines for determining the scope and limits of diplomatic privileges and immunities.²⁸ Moreover, strict application of this theory could result in dangerous consequences because it presupposes a grant of unlimited privileges and immunities which would transcend those ordinarily extended to diplomats.²⁹ Finally, extraterritoriality assumes that diplomatic immunity is based upon the absolute *independence* of nations when, in fact, the question of immunity arises only because nations are *interdependent* in the area of international relations.³⁰

C. *Functional Necessity*

Courts and legal theorists recently have begun to temper the theories of personal representation and extraterritoriality because they define the scope of immunities accorded diplomats too broadly.³¹ "Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions,"³² the current justification for diplomatic immunity is based upon the theory of functional necessity.³³ Under this theory, a diplomat can operate effectively only if given enough liberty to conduct the business with which he is charged.³⁴ Practical necessity dictates that the diplo-

Privileges, Immunities and Disabilities, 25 CHI.-]KENT L. REV. 329, 333 (1947) (suggests that the theory is "outmoded and, logically, no longer applicable.").

27. C. WILSON, *supra* note 7, at 12 (various meanings of the word are listed and analyzed).

28. M. OGDON, *supra* note 26, at 102-03. Because the term "extraterritoriality" does not provide the actual reasons for determining rights and duties, it is of little value as a guideline in determining the scope and limits of diplomatic privileges and immunities.

29. *Id.* Normally, immunities are extended to diplomats based upon their official rank and status. In treating the diplomat as a resident of the sending state, the host state has no jurisdictional authority over him whatsoever. This theory, therefore, has the effect of granting the same immunities to all diplomats regardless of their official positions. D. MICHAELS, *supra* note 20, at 49 n.63.

30. *Diplomatic Personnel*, *supra* note 16, at 198. The major premise for extending privileges and immunities to diplomats is that these privileges and immunities are of vital importance in facilitating relations *between* nations. The theory of extraterritoriality, however, is expressed as an independence from local authority and thus ignores this interdependence between the nations. D. MICHAELS, *supra* note 20, at 49.

31. *See generally* D. MICHAELS, *supra* note 20, at 49.

32. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, Preamble, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

33. D. MICHAELS, *supra* note 20, at 49.

34. Note, *The Diplomatic Relations Act: The United States Protects Its Own*, 5 BROOKLYN J. INT'L L. 379, 384 (1979) [hereinafter cited as *U.S. Protects Its Own*].

matic agent be permitted to perform his duties without fear of civil or criminal prosecution in the country to which he is accredited.³⁵

The reason for recognizing such a theory is best summarized by Sir Cecil Hurst:

The writers of textbooks have dealt at great length with the question why immunities are given to diplomatic representatives, and the nature of the obligation upon States to recognise such immunities. In reality the matter is very simple. The privileges and immunities are founded on the necessities of the case. They are essential to the maintenance of international relations. On no other basis than that of exemption from subjection to the local jurisdiction would sovereign States have been willing in times past or today to send their representatives to the headquarters of another State. On no other terms would it have been possible for foreign diplomatic representatives to fulfil the tasks allotted to them.³⁶

The functional necessity theory is not without criticism. The theory has been attacked as being too vague because it fails to indicate the limits to which immunities essential to "the accepted practice of diplomacy" are to be extended or, for that matter, what the accepted practice of diplomacy is.³⁷ Further, to hold that diplomats require immunity to function effectively implies that diplomats regularly engage in activities that are injurious or illegal.³⁸ Nevertheless, the functional necessity theory "seems less vague than other theories that have been put forward and, also, more soundly based on reality."³⁹ For example, the personal representation and extraterritoriality theories extend blanket immunity to the individual diplomat without any regard to the activities he is to perform within the diplomatic mission. The functional necessity theory, on the other hand, moves the emphasis from the individual and focuses instead on the functions of the diplomat. This is a realistic effort to extend only the immunity necessary to perform the diplomatic mission.

35. D. MICHAELS, *supra* note 20, at 21.

36. C. HURST, *INTERNATIONAL LAW: COLLECTED PAPERS* 174 (1950) (lecture delivered at the Academy of International Law in 1926).

37. C. WILSON, *supra* note 7, at 22.

38. *New Regime*, *supra* note 1, at 670.

39. *Diplomatic Personnel*, *supra* note 16, at 199-200 n.50.

III. HISTORICAL BACKGROUND OF DIPLOMATIC IMMUNITY AS APPLIED IN THE UNITED STATES

A. *The 1790 Statute*

At international common law, diplomatic agents enjoyed numerous privileges and substantial immunity from the receiving state's jurisdiction.⁴⁰ In the early twentieth century, the doctrine of diplomatic immunity was so widespread that in 1906 United States Secretary of State Elihu Root declared that "the immunities of diplomatic agents exist by virtue of the law of nations . . . [and for such] universally accepted principles no authority need be cited."⁴¹ Nevertheless, in the United States, diplomatic immunity has been codified since 1790.

The United States, recognizing diplomatic immunity as essential to international discourse, codified and expanded upon the existing common law when the First Congress passed the Act of April 30, 1790.⁴² From its enactment in 1790 to its repeal in 1978 with the passage of the Diplomatic Relations Act,⁴³ this statute was the sole basis for diplomatic privileges and immunities in the United States.⁴⁴

The 1790 Statute adopted the rule of *Respublica v. De Longchamps*,⁴⁵ which stated that diplomatic immunity is virtually absolute.⁴⁶ In *De Longchamps*, the earliest diplomatic immunity

40. See *New Regime*, *supra* note 1, at 662-63.

41. Letter from United States Secretary of State Elihu Root to the Secretary of Commerce and Labor, Mar. 16, 1906, reprinted in 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 513 (1942).

42. Act of April 30, 1790, ch. 9, §§ 25-27, 1 Stat. 112. Section 25 provides:

[I]f any writ or process shall at any time hereafter be sued forth or prosecuted by any person or persons, in any of the courts of the United States, or in any of the courts of a particular state, or by any judge or justice therein respectively, whereby the person of any ambassador or other public minister of any foreign prince or state, authorized and received as such by the President of the United States, or any domestic or domestic servant of any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels be distrained, seized, or attached, such writ or process shall be deemed and adjudged to be utterly null and void to all intents, construction and purposes whatsoever.

43. Diplomatic Relations Act, Pub. L. No. 95-393, 92 Stat. 808, 808 (1978).

44. Note, *Diplomatic Privileges and Immunities—The Diplomatic Relations Act of 1978: A Congressional Response to a Vexing Problem*, 22 How. L.J. 119, 121 (1979) [hereinafter cited as *Diplomatic Privileges*].

45. 1 U.S. (1 Dall.) 111 (1784). In *DeLongchamps*, a Pennsylvania resident committed a battery against the Secretary of the French Legation by striking the Secretary's cane. As a result of this battery, the Secretary beat the resident "with great severity" and the resident was prosecuted for violating the law of nations. *Id.* at 111-12.

46. 22 U.S.C. § 252 (1976) (repealed 1978). Section 252 provides that "any ambassador

case in the United States, the Supreme Court held that when a diplomat is attacked in any way, either through legal process or through more direct means, "his freedom of conduct is taken away, [and] the business of his Sovereign cannot be transacted"⁴⁷ Further, the statute made it a crime punishable by fine and imprisonment for up to three years to bring suit against a diplomat.⁴⁸

The absolute immunity guaranteed by the 1790 Statute was repeatedly accepted by the courts as a rational principle of international law. In *The Schooner Exchange v. M'Faddon*,⁴⁹ Chief Justice Marshall observed in dicta that a diplomat would be unable to function as the representative of his sending state if he was subject to continued appearances in the receiving state's courts.⁵⁰ More recently, two federal district courts have gone so far as to hold that requiring a diplomat to answer to private suits is a form of coercion⁵¹ and an unjustifiable interference with the performance of his functions.⁵²

Complete immunity, as guaranteed by the 1790 Statute, required proper registration with the United States Department of State.⁵³ The State Department further extended the coverage of the 1790 Statute to administrative and technical employees of the diplomatic mission.⁵⁴ Although the statute itself did not expressly include such personnel, the State Department considered them implicitly covered by the term "domestic" in the statute.⁵⁵ The State Department's extension of immunity was rarely challenged because potential plaintiffs were reluctant to test the proper scope of diplomatic

or public minister or any foreign prince of State, authorized and received as such by the President is absolutely immune from arrest, imprisonment, or seizure of his property."

47. *DeLongchamps*, 1 U.S. (1 Dall.) at 117.

48. 22 U.S.C. § 253 (1976) (repealed 1978). For example, in *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978 (D.C. Cir. 1965), the Court of Appeals for the District of Columbia upheld the refusal of a United States Marshal to serve a summons on the Tunisian ambassador. Chief Judge Bazelon stated that "although courts will not allow a Marshal to avoid his duty to serve process merely because he notices the availability of a defense to suit, they must protect him if service would violate international law and might subject him to the criminal law of the United States." *Id.* at 979.

49. 11 U.S. (7 Cranch) 111 (1812).

50. *Id.* at 138.

51. *See Arcaya v. Paez*, 145 F. Supp. 464, 471-72 (S.D.N.Y. 1956).

52. *Bergman v. De Sieyes*, 71 F. Supp. 334, 341 (S.D.N.Y. 1942).

53. RESTATEMENT (SECOND) OF THE LAW: FOREIGN RELATIONS LAW OF THE UNITED STATES § 73, comment (i) (1965).

54. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 193, 194 (1976) [hereinafter cited as DEP'T OF STATE (1976)].

55. *Id.*

immunity when the penalty for being wrong was three years of imprisonment.⁵⁶

Under the 1790 Statute, the victim of a diplomat's civil or criminal wrong was unable to obtain legal relief in the United States.⁵⁷ This situation was exacerbated by the State Department's extension of blanket immunity to diplomats' families, staff and servants.⁵⁸ As the number of diplomatic personnel in the United States increased, diplomatic abuse of local laws, especially in the area of traffic violations,⁵⁹ became more prevalent. The increased abuses by diplomats created a tremendous public outcry and forced the State Department to re-evaluate its policy of blanket immunity.⁶⁰

B. The 1969 Vienna Convention on Diplomatic Relations

In addition to the United States' codification of diplomatic immunity in 1790, many other nations had their own laws governing diplomatic immunity.⁶¹ During the eighteenth and nineteenth centuries, however, no formal international codification of diplomatic immunity existed.

As early as 1815, attempts began to formulate a comprehensive policy of diplomatic immunity,⁶² but international codification of diplomatic law did not become a reality until the twentieth century.

56. See Act of April 30, 1790, ch. 9, § 26, 1 Stat. 112, 118 (as amended, 22 U.S.C. § 253 (1976) (repealed 1978)). Section 26 provided:

[I]n case any person or persons shall sue forth or prosecute any such writ or process, such person or persons, and all attorneys or solicitors prosecuting or soliciting in such case, and all officers executing any such writ or process, being thereof convicted, shall be deemed violators of the laws of nations, and disturbers of the public repose, and imprisoned not exceeding three years, and fined at the discretion of the court.

Id.

57. *Diplomatic Privileges*, *supra* note 44, at 121.

58. DEP'T OF STATE (1976), *supra* note 54, at 193-94.

59. S. REP. NO. 958, 95th Cong., 2d Sess. 3 (1978).

60. *Id.*

61. See United Nations Legislative Series, II Laws and Regulations Regarding Diplomatic and Consular Privileges and Immunities, U.N. Doc. ST/LEG/Ser.B 7 (1958).

62. Garreton, *The Immunities of Representatives of Foreign States*, 41 N.Y.U. L. REV. 67, 69 (1966).

The Vienna Convention is the first comprehensive, truly international convention on diplomatic immunities. An earlier convention relating to privileges and immunities was signed at the Sixth International Conference of American States, held in Havana, Cuba in 1928, but only American States were represented. The Congress of Vienna in 1815 formulated international law on diplomatic immunity, but only as it pertained to heads of mission. The document was signed by only eight European powers.

C. WILSON, *supra* note 7, at 273.

In 1952, at the request of the United Nations, the International Law Commission studied the possibility of creating a uniform standard for diplomatic representatives. In 1958, the Commission submitted draft articles to a conference of eighty-one nations meeting in Vienna.⁶³ The final result was the Vienna Convention on Diplomatic Relations of 1961.⁶⁴

The Convention attempted to clarify and codify the existing international common law and practice of diplomatic relations among nations.⁶⁵ Twelve of the fifty-three articles of the Convention dealt directly with personal immunity.⁶⁶ These twelve articles established the various categories of diplomats protected as well as the scope of that protection. For example, Article 37 classified members of the diplomatic mission into four categories receiving decreasing degrees of immunity:⁶⁷ (1) the diplomat's family; (2) the administrative and technical staff; (3) the service staff;⁶⁸ and (4) private servants.⁶⁹

A comparison of the immunities enumerated in the 1790 Statute and those provided by the Convention reveals several differences. First, diplomatic agents under the statute are entitled to full civil and criminal immunity from legal process in the United States.⁷⁰ Under the Convention, diplomatic agents have full immunity from criminal prosecution by the host state, but have three ex-

63. *Vienna Convention on Diplomatic Relations: Hearing before the Subcomm. of the Senate Comm. on Foreign Relations*, 88th Cong., 1st Sess. 2 (1965) (statement of Leonard C. Mecker).

64. *Vienna Convention on Diplomatic Relations*, Apr. 18, 1961, 23 U.S.T. 3227 T.I.A.S. No. 7502, 500 U.N.T.S. 95. As an indication of its acceptance in the international community, 112 nations became parties to the Vienna Convention within ten years after its entry into force. E. DENZA, *DIPLOMATIC LAW* 1 (1976).

65. *Diplomatic Privileges and Immunities: Hearings and Markup before the Subcomm. on Internal Operations of the House Comm. on International Relations*, 95th Cong., 1st Sess. 96 (1977) (statement of Burno Ristau, Dep't of Justice).

66. *Vienna Convention on Diplomatic Relations*, Apr. 18, 1961, arts. 29-40, 23 U.S.T. 3229, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

67. *Id.* art. 37.

68. *Id.* art. 1(d), (f), (g). Article 1 of the Convention provides in pertinent part:

(d) the "members of the diplomatic staff" are the members of the staff of the mission having diplomatic rank;

(f) the "members of the administrative and technical staff" are the members of the staff of the mission employed in the administrative and technical service of the mission

Id. art. 1(d), (f).

69. *Id.* art. 1(h).

70. Act of April 30, 1790, ch. 9, §§ 25-27, 1 Stat. 112, 117-18 (amended by 22 U.S.C. §§ 252-254 (1976) (repealed 1978)).

ceptions to full civil immunity.⁷¹ Second, administrative and technical staffs are granted full civil and criminal immunity under the statute. Under the Convention, they are granted complete criminal immunity, but their civil immunity is limited only to acts performed within the scope of their official duties.⁷² Third, members of the service staff enjoy full civil and criminal immunity under the statute, but under the Convention they are entitled to civil and criminal immunity only to the extent of their official acts.⁷³ Fourth, private servants are granted blanket immunity under the statute, but are denied immunity under the Convention, with the notable exception of receiving those immunities extended by the host state.⁷⁴ Finally, family members of both diplomatic agents and administrative staff enjoy the same immunities as do the respective personnel under the Convention.⁷⁵

Inconsistencies between the Vienna Convention and the 1790 Statute delayed the United States' implementation of the Convention's narrower immunity provisions.⁷⁶ Although the United States signed the Convention in 1961, it was not ratified by the United States Senate until 1965,⁷⁷ and did not enter into force of law until 1972.⁷⁸ At that time, the State Department still granted full immunity under the 1790 Statute.⁷⁹ The long delay between the signing of the Vienna Convention and its ratification resulted from Congress' attempt to enact new legislation repealing the 1790 Statute before the Convention was ratified.⁸⁰ Congress deemed this repeal neces-

71. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 31, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95. These exceptions are: (1) an action relating to private immovable property in the local jurisdiction; (2) an action relating to succession in which the diplomatic agent is involved as executor or heir; and (3) an action relating to any professional or commercial activity outside the scope of the diplomat's official functions. *Id.*

72. *Id.* art. 37(2).

73. *Id.* art. 37(3).

74. *Id.* art. 37(4).

75. *Id.* art. 37(1). Since service staff enjoyed immunity only as to official acts, family members of these personnel in effect enjoyed no immunities. *See id.*

76. *Consequences*, *supra* note 10, at 139-40.

77. 111 CONG. REC. 22935 (daily ed. Sept. 14, 1965).

78. 67 DEP'T ST. BULL. 443 (1972).

79. In Senate hearings on the Diplomatic Relations Act, a State Department spokesman explained that "at the time the Vienna Convention was ratified the executive department [sic] determined that the 1790 statute was not superseded." *Diplomatic Immunity Legislation: Hearing on H.R. 7819 before the Senate Comm. on Foreign Relations*, 95th Cong., 2d Sess. 23 (1978) (remarks of Horace Shamwell, Dep't of State).

80. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1964 (1974).

sary to conform the international standards of the Vienna Convention to the domestic standards of diplomatic immunity.⁸¹

C. *The Diplomatic Relations Act of 1978*

In 1978, through the Diplomatic Relations Act,⁸² Congress repealed the 1790 Statute and implemented relevant provisions of the Vienna Convention as the expression of United States law on diplomatic immunity.⁸³ The Act was designed to "complement" the Vienna Convention on Diplomatic Relations⁸⁴ and does not deal with the full range of diplomatic relations included in the Convention.⁸⁵

The more pertinent provisions of the Act include:

- (1) Establishment of the Convention's privileges and immunities as the sole expression of United States law on the subject;⁸⁶
- (2) Extension of the Convention's provisions to members of diplomatic missions of sending States which had not ratified the Convention;⁸⁷
- (3) Presidential authorization to extend more favorable or less favorable treatment than was provided under the Convention;⁸⁸
- (4) Dismissal of actions against individuals entitled to immunity under either the Convention or the Act;⁸⁹

81. *Id.*

82. Pub. L. No. 95-393, 92 Stat. 808 (1978) (codified at 22 U.S.C. § 254 (1978), 28 U.S.C. § 1364 (1978)).

83. *Id.* at 808-10.

84. *Id.* at 808.

85. *Diplomatic Privileges and Immunities: Hearings on H.R. 1536, H.R. 6133, and H.R. 3841 before the Subcomm. on Internal Operations of the House Comm. on International Relations*, 95th Cong., 1st Sess. 120 (1977) (statement of Virginia Schlundt, subcommittee staff).

86. Diplomatic Relations Act, Pub. L. No. 95-393, § 3, 92 Stat. 808 (1978).

87. *Id.* § 3(b) (codified as amended at 22 U.S.C. § 254(b) (1978)). "Since the Vienna Convention is universally accepted as a codification of binding customary international law on the subject, it is probable to assume that [these] . . . privileges and immunities would be extended to nonsignatory nations." DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 275 (1977) [hereinafter cited as DEP'T OF STATE (1977)].

88. Diplomatic Relations Act § 4 (codified as amended at 22 U.S.C. § 254(c) (1982)):

The President may, on the basis of reciprocity and under such terms and conditions as he may determine, specify privileges and immunities for the mission, members of the mission, their families, and the diplomatic couriers which result in more favorable treatment or less favorable treatment than is provided under the Vienna Convention.

Id.

89. *Id.* § 5 (codified at 22 U.S.C. § 254(d) (1978)):

Any action or proceeding brought against an individual who is entitled to immu-

- (5) Repeal of the United States Supreme Court's exclusive jurisdiction over suits involving diplomats and establishment of original jurisdiction in federal district courts;⁹⁰ and
- (6) Implementation of mandatory insurance and direct action provisions.⁹¹

The most influential and innovative provisions of the Act are the mandatory insurance and direct action provisions which focus on the immunity of the diplomat from vehicular accident liability.⁹² Because traffic accidents and resulting injuries constitute the largest number of complaints regarding the misuses of diplomatic immunity,⁹³ the mandatory insurance and direct action requirements were included to address these abuses. Section 6 of the Act requires diplomats to obtain mandatory liability insurance.⁹⁴ This section further provides that "[t]he President shall, by regulation, establish liability insurance requirements."⁹⁵ This authority was delegated to the State Department,⁹⁶ which has proposed several regulations,⁹⁷ including suggested minimum limits on liability coverage.⁹⁸ Nevertheless, the

nity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations, under section 254(b) or 254(c) of this Act, or under any other laws extending diplomatic privileges and immunities, shall be dismissed. Such immunity may be established upon motion or suggestion by or on behalf of the individual, or as otherwise permitted by law or applicable rules of procedure.

Id.

90. *Id.* § 8 (codified at 28 U.S.C. § 1351 (1978)). The exclusive jurisdiction clause was codified at 28 U.S.C. § 1251(a)(2) (1978), but has never been successfully invoked in its 180 years of existence. Further, there is only one known instance where an attempt was made to bring an original action in the Supreme Court against a foreign ambassador or his servant. *Founding Church of Scientology v. Lord Cramer*, 404 U.S. 933 (1971) (motion for leave to file bill of complaint denied); DEP'T OF STATE (1977), *supra* note 87, at 267.

91. Diplomatic Relations Act § 6 (codified at 22 U.S.C. § 254(e) (1983)). Compared with other members of the international community, the United States was late in establishing compulsory insurance for diplomats and in creating a right of direct action against insurers. SENATE COMM. ON THE JUDICIARY, DIPLOMATIC RELATIONS ACT, S. REP. NO. 1108, 95th Cong., 2d Sess. 3-4 (1978).

92. Increased media attention to the plight of persons injured in accidents with "immune" foreign diplomats contributed greatly to the passage of the Act. 124 CONG. REC. S13, 695-97 (daily ed. Aug. 17, 1978) (remarks of Senators Mathias, Sarbanes and Thurmond).

93. SENATE COMM. ON FOREIGN RELATIONS, REPORT ON LEGISLATIVE HISTORY OF THE DIPLOMATIC RELATIONS ACT, 96th Cong., 1st Sess. 22 (1979).

94. Diplomatic Relations Act § 6 (codified at 22 U.S.C. § 254(e) (1978)).

95. *Id.*

96. Exec. Order No. 12,101, 43 Fed. Reg. 54,195 (1978).

97. 43 Fed. Reg. 57,159 (1978) (codified at 22 C.F.R. § 151 (1978)).

98. *Id.* at 57,160 (codified at 22 C.F.R. § 151.5 (1978)). The regulations propose a minimum liability of \$100,000 per person, \$300,000 per incident for bodily injury, and \$50,000 per incident for property damage, but permit the receiving state to make the final determination. *Id.*

State Department allows the receiving state to make the final determination of minimum coverage.⁹⁹ The insurance coverage requirements of most states are less than those recommended by the State Department.¹⁰⁰

In an attempt to guarantee mandatory insurance recovery, section 7 of the Act creates a federal remedy allowing an injured party to proceed directly against a diplomat's insurer.¹⁰¹ Under the direct action provision, the insurance company may not offer the diplomatic immunity of its insured as a defense.¹⁰² Absent such a provision, an insurer would receive a windfall since it could collect premiums while being shielded from liability.¹⁰³

99. *Id.*

100. Compare the mandatory coverage in New York and the District of Columbia where the limit is \$20,000 per incident for bodily injury, and only \$5,000 for property damage. N.Y. INS. LAW § 673 (McKinney Supp. 1979); D.C. CODE ANN. § 40-43 (1973 & Supp. 1978).

101. 28 U.S.C. § 1364(a)-(b) (Supp. 1984).

(a) The district courts shall have original and exclusive jurisdiction, without regard to the amount in controversy, of any civil action commenced by any person against an insurer who by contract has insured an individual, who is a member of a mission [as defined in the Vienna Convention on Diplomatic Relations] or a member of the family of such a member of a mission . . . against liability for personal injury, death, or damage to property.

(b) Any direct action brought against an insurer under subsection (a) shall be tried without a jury, but shall not be subject to the defense that the insured is immune from suit, that the insured is an indispensable party, or in the absence of fraud or collusion, that the insured has violated a term of the contract unless the contract was cancelled before the claim arose.

Id.

The constitutionality of a federal direct action statute was raised in congressional hearings. *Claims Against Persons Entitled to Diplomatic Immunity: Hearings on H.R. 7679 before the House Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary*, 95th Cong., 1st Sess. 13 (1977) (remarks of Rep. Thomas Kindness, Ohio). The constitutional objections were overcome when the Supreme Court upheld a state direct action law in *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954), against equal protection, due process and contract clause challenges.

102. Compare *Dickinson v. Del Solar*, [1930] 1 K.B. 376, 380, 142 L.T.R. (n.s.) 66, 67 (1930), an early English case in which an insurance company attempted to shield itself from liability by contending that the diplomatic immunity status of the insured should extend to the insurer. Had the Minister not waived the diplomatic agent's immunity, the court was willing to permit such an extension, thereby making the insurance coverage a fiction. See also *Windsor v. State Farm Ins. Co.*, 509 F. Supp. 342, 343 (D.D.C. 1978).

103. *Diplomatic Immunity Legislation: Hearings before the Senate Foreign Relations Comm.*, 95th Cong., 2d Sess. 20 (1980) (statement of Richard Gookin, Deputy Chief of Protocol); see also *Diplomatic Immunity: Hearing on S. 476, S. 477, S. 1256, S. 1257 and H.R. 7819 before the Subcomm. on Citizens' and Shareholders' Rights and Remedies of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 42-45 (1978) (exchange between Senator Metzenbaum and Stacy L. Williams, asst. vice-president and associated legislative counsel, Gov't Employees Ins. Co.).

The mandatory insurance and direct action provisions, however, have been criticized for four major reasons. First, the Act is "not retroactive and some of the victims of past accidents remain uncompensated."¹⁰⁴ Second, the prospective minimum liability coverage standards required by the individual states are often inadequate to compensate injured victims fairly.¹⁰⁵ Third, and closely related to the second criticism, the accident victim who sustains injuries greater than the amount of the diplomat's insurance coverage is left without any additional means of recovery,¹⁰⁶ because, unlike most citizens, the diplomat is not subject to a lawsuit beyond the effective insurance coverage.¹⁰⁷ Finally, the direct action provision makes diplomats undesirable policyholders and United States insurance companies reluctant to insure them.¹⁰⁸

III. IMMUNITY FROM CRIMINAL PROSECUTION

A recurring theme throughout the history of diplomatic immunity is the immunity diplomatic personnel enjoy from criminal prosecution in the host state.¹⁰⁹ This universal rule of immunity is stated in Article 31(1) of the Vienna Convention: "A diplomatic agent shall enjoy [absolute] immunity from the criminal jurisdiction of the receiving State."¹¹⁰ This became law in the United States with the passage of the Diplomatic Relations Act of 1978.¹¹¹

104. Comment, *The Effect of the Diplomatic Relations Act*, 11 CAL. W. INT'L L.J. 354, 368 (1981).

105. See *supra* notes 98-100.

106. 22 C.F.R. § 151.9 (1978).

107. *Id.*

108. House Comm. on the Judiciary, Amending Title 28, United States Code, to Provide for Action Against Insurers on Claims Against Persons Entitled to Diplomatic Immunity, J.R.R.N. 1410, 95th Cong., 2d Sess. 4 (1978). The insurance spokesmen contended that:

[T]he entire issue of providing just compensation to innocent victims of diplomatic negligence is a social and governmental problem. It is not one that should be unilaterally imposed on the private insurance industry. Should both the Diplomatic Relations Act and the direct action legislation become law, it will effectively close the voluntary market on liability insurance to diplomats in the United States.

109. See *U.S. Protects Its Own*, *supra* note 34, at 388.

110. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 31(1), 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95. The host state, however, may declare a diplomat to be *persona non grata* (a person not warranting immunity) for any reason. *Id.* art. 9; I. BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 343 (2d ed. 1973). For a definition of *persona non grata*, see *infra* note 174.

111. Diplomatic Relations Act, Pub. L. No. 95-393, § 3, 92 Stat. 808 (1978).

A. Criminal and Police Jurisdiction

Most commentators¹¹² as well as most courts¹¹³ support absolute immunity from criminal prosecution. Many commentators contend that under both the theory and practice of international law, diplomatic agents may not be tried or punished by local courts for committing a crime.¹¹⁴ Criminal immunity derives support from the functional necessity theory's goal of maintaining public order and preserving free and uninterrupted relations among nations.¹¹⁵

Immunity from the jurisdiction of local police is a traditional right inherent in a diplomat's immunity from criminal prosecution.¹¹⁶ This right is articulated in a District of Columbia Police Departmental Order which states that "the person entitled to such immunity may not be detained or arrested or subjected to a body search, may not be prosecuted and may not be required to give evidence as a witness"¹¹⁷ This statement does not mean, however, that diplomats are exempt from local police regulations. Article 41, paragraph 1, of the Vienna Convention incorporates this idea by declaring that "[w]ithout prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State."¹¹⁸

Nevertheless, abuse by diplomats of local laws and regulations is not uncommon, especially infractions of municipal traffic ordinances. Traffic violations, such as speeding, running stop signs and

112. See E. SATOW, A GUIDE TO DIPLOMATIC PRACTICE 181 (N. Bland ed. 1957) (immunity extends to any "ordinary crime"); C. FENWICK, INTERNATIONAL LAW 469 (1948) (public ministers are "completely immune" from criminal prosecution).

113. *United States v. Enger*, 472 F. Supp. 490 (S.D.N.Y. 1978) (no immunity was granted because those charged with espionage were not duly authorized as "diplomats"); see also *Rex v. A.B.*, [1941] 1 K.B. 454 (1941) (diplomatic representative of another country, duly authorized by his own government, was granted immunity from criminal jurisdiction of the host state). In a 1978 espionage case, Vietnam's ambassador to the United Nations, Dink Ba Thi, was ordered to leave the United States while his accomplice, a United States citizen, was convicted as a spy and sentenced to five years imprisonment. *NEWSWEEK*, Feb. 13, 1978, at 25.

114. I. BROWNIE, *supra* note 110, at 343; I L. OPPENHEIM, INTERNATIONAL LAW, PEACE 790 (Lauterpracht 8th ed. 1955).

115. D. MICHAELS, *supra* note 20, at 50.

116. C. WILSON, *supra* note 7, at 89.

117. Departmental Order, Dist. of Columbia, Metropolitan Police Department, Diplomatic Immunity, Gen. Order 308, No. 12 (Dec. 28, 1979).

118. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 41, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

not paying parking tickets present special enforcement problems.¹¹⁹ The magnitude of this problem is vividly illustrated in New York and Washington, D.C., the two cities with the largest diplomatic populations. United Nations officials in New York City accounted for 250,000 parking tickets, few of which have been paid.¹²⁰ During 1976, fewer than one-fifth of 52,830 parking tickets issued to automobiles bearing diplomatic plates in Washington, D.C., were paid.¹²¹ Because most jurisdictions within the United States classify traffic violations as criminal offenses,¹²² diplomats continue to escape prosecution for these violations under the Diplomatic Relations Act, which grants criminal immunity to most categories of diplomatic personnel.¹²³ The question remaining, therefore, is which categories of diplomats are protected from criminal prosecution?

B. Categories of Diplomats Protected under the Diplomatic Relations Act

Of the four major categories of the "diplomatic mission," only two—diplomatic agents, and administrative and technical staff—are granted complete immunity from criminal prosecution.¹²⁴ Family members of these two groups also enjoy these immunities.¹²⁵ Functional necessity dictates that those privileges and immunities granted to the diplomatic agent be extended to his family.¹²⁶

119. *Diplomatic Privileges and Immunities: Hearings and Markup before the Subcomm. on Internal Operations of the House Comm. on International Relations*, 95th Cong., 1st Sess. 40-41 (1977) (statement of Hon. Walter E. Fauntroy, a Delegate in Congress from the District of Columbia) [hereinafter cited as *Hearings and Markup*].

120. These unpaid tickets amounted to \$5 million. N.Y. Times, Oct. 3, 1978, at 50. In Washington, D.C., between March, 1976, and February, 1977, there were a total of 37,905 unpaid diplomatic parking tickets at an unredeemed value of \$1,070,730. *Hearings and Markup*, *supra* note 119, at 49 (statement of Rep. Stephen J. Solarz, New York).

121. *Hearings and Markup*, *supra* note 119, at 40-41.

122. See *Diplomatic Immunity: Hearings before the Senate Subcomm. of the Comm. of the Judiciary on Citizens and Shareholders' Rights and Remedies*, 95th Cong., 2d Sess. 126-39 (1978). It should be noted that in the District of Columbia, regulations proscribing minor traffic violations have been transferred from the criminal code to the civil code, and more vigorous enforcement against diplomats with limited civil liability is expected. Effective January 29, 1979, the District of Columbia decriminalized parking violations. Bowman, *Many Embassy Aides To Lose Parking Immunity*, Wash. Post, Jan. 13, 1979, at C-1, col. 1.

123. 22 U.S.C. § 254(d) (1982).

124. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, arts. 31(1) & 37(2), 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

125. *Id.* art. 37(1). This Comment limits discussion to diplomatic agents and their families.

126. O'Keefe, *Privileges and Immunities of the Diplomatic Family*, 25 INT'L & COMP.

The general rule that diplomatic agents (ambassadors and ministers) are exempt from criminal prosecution in the courts of the country to which they are accredited has not been seriously contested.¹²⁷ However, the immunities granted to the diplomat's family, and the rationale for granting such immunities, have both been challenged.

The immunity provisions of the Vienna Convention applicable to a diplomat's family were incorporated into the Diplomatic Relations Act of 1978.¹²⁸ Article 37, paragraph 1, of the Vienna Convention states that "[t]he members of the *family* of a diplomatic agent forming part of the household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36."¹²⁹ Article 37 immunity is therefore contingent upon membership in the "family" and inclusion as part of the "household." Interpretation of these terms, however, has produced multifarious definitions. The international view is that "family" includes at least spouses, dependent parties and children of different age groups,¹³⁰ while "household" includes private servants who are not nationals of the receiving state but who live under the same roof.¹³¹ The United States interpretation of these terms, however, is more specific:

[T]he wife of a diplomatic agent, his minor children, and perhaps his children that are full-time college students or who are totally dependent on him, are entitled to diplomatic immunity Other cases, e.g. unmarried adult daughters, dependent parents, and sisters acting as official hostesses, are decided on the basis of the facts in the particular situation and the practice in the receiv-

L.Q. 329, 332-33 (1976); I YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 162 (1958) ("Unless the members of a diplomatic agent's family enjoyed immunity, pressure could be brought to bear upon the diplomatic agent through his family").

127. See *Vulcan Iron Works, Inc. v. Polish Am. Mach. Corp.*, 472 F. Supp. 77, 78 (S.D.N.Y. 1979) ("[t]he immunity of representatives of foreign nations . . . from criminal . . . jurisdiction has long been a precept of international law").

128. Diplomatic Relations Act, Pub. L. No. 95-393, 92 Stat. 808 (1978).

129. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 37(1), 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 (emphasis added). Article 37 represents the minimum privileges and immunities a state is obliged to grant to a diplomatic family. The state may exceed these standards by agreement with the sending state if it so desires. Articles 29 through 36 state that a diplomat's family may never be subjected to legal process except in cases involving real property, successions, or professional or commercial activity. See *id.* art. 31(1).

130. DEP'T OF STATE (1977), *supra* note 87, at 272.

131. I YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 123 (1957).

ing state.¹³²

Extending immunity to the diplomat's wife is illustrated in two New York cases: *Friedberg v. Santa Cruz*¹³³ and *People v. Von Otter*.¹³⁴ Both cases involved suits for the negligent operation of motor vehicles against the wives of diplomatic agents. The defendant-wives pled the affirmative defense of absolute and unconditional immunity. The courts held for the defendants by extending the husbands' diplomatic immunities, as State Department diplomatic agents, to the wives as a matter of federal law.¹³⁵

Children of foreign ambassadors often abuse the immunities afforded to them as members of a diplomat's family. Such abuses are illustrated by the following incidents involving serious traffic violations. The first incident involved the twenty-one year old son of the Irish ambassador to the United States, John J. Hearne.¹³⁶ Young Hearne was charged with homicide when his car struck and killed a domestic worker as she was crossing the street.¹³⁷ The charge was dropped when diplomatic immunity was invoked.¹³⁸ The other two incidents involved sons of ambassadors to the United States from Paraguay and Pakistan.¹³⁹ Both situations involved charges of reckless driving, but neither one resulted in criminal prosecution because diplomatic immunity was invoked. In one instance the police chief threatened to assign a three-man force to arrest the son and bring him before a judge "to show that traffic laws were not to be 'sneezed at.'"¹⁴⁰ The State Department, however, intervened and cancelled the "marching orders" because the ambassador's immunity extended to his son.¹⁴¹

The foregoing examples demonstrate that a diplomat's immunity from criminal prosecution extends to the diplomat's immediate family. Further, Article 39(1) of the Convention states that those family members extended such immunities "enjoy them from the

132. 7 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 260 (1963).

133. 193 Misc. 599, 86 N.Y.S.2d 369 (1949).

134. 202 Misc. 901, 114 N.Y.S.2d 295 (1952).

135. *Friedberg*, 193 Misc. at 600, 86 N.Y.S.2d at 370; *Von Otter*, 202 Misc. at 901, 114 N.Y.S.2d at 297. See 22 U.S.C. § 1251 (1979) (these cases are rarely adjudicated on their merits).

136. C. WILSON, *supra* note 7, at 187.

137. *Id.*

138. *Id.*

139. *Id.* at 188.

140. *Id.* at 189.

141. *Id.*

moment [the diplomat] enters the territory of the receiving State on proceeding to take up his post."¹⁴² Moreover, these immunities do not immediately cease to exist when the family member is no longer "part of the household."¹⁴³ If for some reason the diplomat's immunities cease (e.g., the diplomat dies at his post or is recalled by the sending state), "the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the [expiration] of a reasonable period in which to leave the country."¹⁴⁴

While extending immunity to family members of diplomatic agents is explicit within both the Vienna Convention and Diplomatic Relations Act, extending such immunity to private servants in the "household" is an entirely different matter. According to the Act, a private servant is prohibited from invoking the immunity of the diplomat for whom he or she works.¹⁴⁵ Article 37(4) states that private servants "may enjoy privileges and immunities only to the extent admitted by the receiving State."¹⁴⁶ Nevertheless, in *United States v. Santizo*¹⁴⁷ and *United States v. Ruiz*,¹⁴⁸ criminal cases decided after the adoption of the Vienna Convention, private servants attempted to shield themselves from criminal liability by asserting the immunity of their diplomatic employer. Both attempts were unsuccessful.

In *Santizo*,¹⁴⁹ one defendant, Ruiz, was a chauffeur to the ambassador of Peru and the husband of the other defendant, Santizo. Santizo was convicted of criminal abortion, while Ruiz was acquitted of being an accessory to the crime. Santizo moved for a new trial contending that she and her husband, as private servants of the ambassador, were entitled to diplomatic immunity from criminal

142. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 39(1), 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

143. O'Keefe, *supra* note 126, at 350 (citing arts. 10(1)(b), 39(1) & 39(2)). The question remains as to who exactly is included as "part of the household." See M. WHITEMAN, *supra* note 132, at 262.

144. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 39(3), 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

145. *Id.* art. 37(4).

146. *Id.* Article 37(4) further states that "the receiving State must exercise its jurisdiction over [private servants in the household] in such a manner as not to interfere unduly with the performance of the functions of the mission."

147. No. C-971-63 (D.C. 1963), as reported in Harris, *Diplomatic Privileges and Immunities: A New Regime Is Soon To Be Adopted by the United States*, 62 AM. J. INT'L L. 98, 111 (1968).

148. No. 10150-65 (D.C. 1965), as discussed in *id.* at 112-13.

149. See *supra* note 147.

prosecution. The district court denied her motion.¹⁵⁰ A similar immunity claim was raised in *United States v. Ruiz*,¹⁵¹ where the defendant was charged with larceny. The district court held that the servant would have been entitled to diplomatic immunity if the Peruvian ambassador had asserted it on the servant's behalf. The ambassador did not assert such immunity, however, and the defendant was subsequently convicted.¹⁵² These cases indicate that the courts are reluctant to extend immunity to private servants within the diplomat's "household." Nevertheless, the *Ruiz* court's failure to establish an absolute rule against immunity for servants leaves the door open for future claims. Thus, extending these immunities to the private servants within the household requires case-by-case analysis until an absolute rule is established.

C. *Sanctions Imposed to Prevent Abuses*

Although the normal procedures and sanctions against those who break local laws cannot be enforced against diplomats, a number of safeguards exist which are designed to deter diplomatic representatives from breaking local laws.¹⁵³ The sending state's retention of jurisdiction over its own diplomats serves as one such safeguard.¹⁵⁴ With this safeguard, an injured party is entitled to sue a diplomat in the courts of the sending state where the diplomat does not enjoy immunity.¹⁵⁵ In *Dickinson v. Del Solar*,¹⁵⁶ Lord Hewart stated that "[e]ven if execution could not issue in this country while Mr. Del Solar remains a diplomatic agent, presumably it might issue if he ceased to be a privileged person, and the judgment might also be the foundation of proceedings against him in [his sending state] at any time."¹⁵⁷ Nevertheless, this safeguard is rarely used in practice.¹⁵⁸

Another safeguard available is the waiver of diplomatic immu-

150. See Harris, *supra* note 147, at 111-12 (note that Santizo was not a diplomatic employee herself).

151. See *supra* note 148, at 112 (Ruiz was the defendant in both of these suits).

152. *Id.*

153. See generally Hill, *Sanctions Constraining Diplomatic Representatives To Abide by the Local Law*, 25 AM. J. INT'L L. 252, 253-68 (1931) [hereinafter cited as *Sanctions Constraining Diplomats*] (discusses the options open to the injured victim or state).

154. C. WILSON, *supra* note 7, at 32.

155. *Sanctions Constraining Diplomats*, *supra* note 153, at 255.

156. [1930] 1 K.B. 376 (1930).

157. *Id.* at 380.

158. *Sanctions Constraining Diplomats*, *supra* note 153, at 268.

nity by the sending state:¹⁵⁹

Diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction. The privilege is the privilege of the Sovereign by whom the diplomatic agent is accredited, and it may be waived with the sanction of the Sovereign or of the official superior of the agent.¹⁶⁰

In *United States v. Arizti*,¹⁶¹ the defendant-diplomat relied upon diplomatic immunity as a defense to criminal prosecution for conspiracy and violating the federal narcotics law. The diplomat's government chose to waive his immunity, even though the diplomat himself did not consent to the waiver.¹⁶² He was subsequently convicted.¹⁶³ The district court held that "the immunity is that of [defendant's] government and is not personal to him. . . . His government's waiver of diplomatic immunity . . . does not require his consent."¹⁶⁴

Although sending states do not generally waive a diplomat's immunity from criminal prosecution, waiver may be granted when subordinate members of a diplomatic mission are accused of committing a crime. In *Rex v. A.B.*,¹⁶⁵ a United States Embassy clerk in England was convicted of criminal charges when, prior to the criminal proceeding, the clerk was dismissed from his employment and his immunity was waived by the United States.¹⁶⁶ Nevertheless, this situation is the exception to the rule. For example, when a Dutch Embassy vehicle struck and killed a man in Great Britain, the Netherlands ambassador was asked to waive diplomatic immunity of the driver. After consulting with the government, the ambassador refused to waive the driver's immunity.¹⁶⁷

159. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 32(1), 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 ("The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.").

160. *Dickinson v. Del Solar*, [1930] 1 K.B. 376, 380, 142 L.T.R. (n.s.) 66, 66; *see generally* *Taylor v. Best*, 14 C.B. 487 (1854).

161. 229 F. Supp. 53 (S.D.N.Y. 1964).

162. Immunity was waived because defendant was not engaged in any diplomatic function within the United States at the time of his offense. *Id.* at 54.

163. *Id.* at 55.

164. *Id.*

165. [1941] 1 K.B. 454 (1941).

166. *Id.* at 456.

167. 54 THE TIMES (London) 13 (May 23, 1958). If this same situation were to happen today in the United States, the driver could be considered a member of the service staff and therefore immune from criminal prosecution as long as the accident occurred while in the

Some commentators recommend that immunity be waived in criminal cases if the crime is punishable by local law and if the courts of the country provide a fair forum.¹⁶⁸ However, a sending state's refusal to waive immunity in these instances may insult the receiving state, especially if the sending state bases refusal on the claimed inability of local courts to provide a fair forum.¹⁶⁹ Therefore, if the sending state will not waive immunity, it is recommended that the state provide a fair forum for criminal prosecution against the offending diplomat.¹⁷⁰

Additional safeguards against abuses include recall, dismissal or expulsion of the diplomat.¹⁷¹ Article 9(1) of the Vienna Convention provides:

The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission.¹⁷²

If a diplomat habitually breaks the law, or if the offense with which the individual is charged is serious, sufficient grounds exist for the recall of the diplomat by the sending state.¹⁷³ Otherwise, the diplomat runs the risk of being declared *persona non grata*.¹⁷⁴ The normal procedure, however, is to report violations to the head of the diplomatic mission who, in turn, dismisses or transfers those diplomats with numerous violations.¹⁷⁵

In theory, recall, dismissal and expulsion are effective sanctions

course of his official duties. See Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 37(2), 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

168. *Sanctions Constraining Diplomats*, *supra* note 153, at 260-61.

169. *Id.*

170. *Id.*

171. *Id.* at 256.

172. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 9(1), 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

173. DEP'T OF STATE (1977), *supra* note 87, at 263; see also *Sanctions Constraining Diplomats*, *supra* note 153, at 256-58, 263.

174. In international law and diplomatic usage, a *persona non grata* is "a person not acceptable [for reasons peculiar to himself] to the court or government to which it is proposed to accredit him in the character of an ambassador, or minister." BLACK'S LAW DICTIONARY 1330 (4th ed. 1968).

175. C. WILSON, *supra* note 7, at 90. A sending state often relocates diplomats who have created adverse public attention because of abuses to receiving states. *Id.*

because they act as specific deterrents to gross infractions of the host state's laws by diplomats, and they prevent repeated violations of these laws by removing the offender from the country.¹⁷⁶ Practice reveals, however, that sending states are reluctant to recall accused diplomats and that receiving states are hesitant to dismiss or expel diplomats unless the charges are serious.¹⁷⁷

Nevertheless, when a diplomat's actions threaten the safety and security of a receiving state, it is serious enough to justify dismissal or expulsion. State security takes precedence over a diplomat's immunity.¹⁷⁸ Therefore, the rules of immunity from arrest and detention can be circumvented when the diplomat's conduct threatens the national security of the host state.¹⁷⁹

The importance of national security is not a new development in diplomatic law. It is supported by *Rose v. The King*,¹⁸⁰ a 1947 Canadian case involving an embassy employee who stole documents from the host embassy. The court permitted the diplomatic employee to be prosecuted. One justice concluded:

Before granting or recognizing a privilege to another State, a State has the right to accord to itself a first privilege, that of its own security. To decide otherwise would be to grant a so-called international rule of authority superior to the strict, rigid, and necessary rule that the State, first and foremost, owes to its own citizens . . . its own security.

The first duty of a diplomatic agent is to respect the security of the state.¹⁸¹

In general, these sanctions indicate an overall effort by the receiving state to hold diplomats accountable for their conduct within the state. The effectiveness of these sanctions, however, depends upon proper enforcement by the State Department. The State Department should handle disputes expeditiously by directly resolving them with the respective embassies and their sending states.¹⁸² Fi-

176. *Sanctions Constraining Diplomats*, *supra* note 153, at 257.

177. DEPT OF STATE (1977), *supra* note 87, at 263; *see also Sanctions Constraining Diplomats*, *supra* note 153, at 256.

178. C. WILSON, *supra* note 7, at 83-86.

179. *Id.*

180. 2 Can. C.R. 107, 3 D.L.R. 618 (1947) (Bissonnette, J., translation).

181. *Id.* at 165, 3 D.L.R. at 646.

182. For example, the British Embassy has a policy of always paying their traffic fines. An Embassy spokesman said: "We have a strict rule, no one is to claim diplomatic immunity." Gupte, *Privileges for Diplomats in U.S. Stir Resentment and May be Curbed*, N.Y. Times, July 18, 1978, § II, at B8, col. 4.

nally, assistance by the diplomats themselves is essential if the abuses of diplomatic privileges and immunities are to be curtailed.

IV. CONCLUSION

The Diplomatic Relations Act of 1978 is the sole embodiment of diplomatic law in the United States. According to the Act, a diplomatic agent is still immune from the criminal jurisdiction of the receiving state. The Act takes major steps, however, to limit the classes of diplomatic personnel accorded immunity. Only those persons integral to the efficient functioning of the diplomatic mission—diplomatic agents, administrative personnel and technical staffs—are granted full immunity from criminal prosecution. In addition, through its mandatory automobile insurance and direct action provisions, the Act provides necessary redress to those most often injured by diplomats.

In general, the Act is a monumental step toward holding diplomats accountable for their activities within the United States. Nevertheless, it is not without criticism. Even though the Act limits those who may claim immunity from criminal prosecution, it still enables eligible diplomats to violate local laws without any fear of legal consequences. The justification for this extension of immunity to criminal conduct is that if a diplomat is forced to defend himself in court he cannot function efficiently. It seems absurd to hold that a diplomat cannot function efficiently unless prohibited from being prosecuted for violating local laws or permitted to engage in activities that harm others. Criminal offenses committed by a diplomat do *not* further the efficient functioning of a diplomatic mission—rarely is it within the legitimate scope of a diplomat's duties to break criminal laws or injure citizens.

The Act attempts to narrow the scope and class of diplomats protected. The Act has failed, however, to narrowly draw these classes and their scope of protection. By further limiting the scope of protection to only those acts performed in the course of a diplomat's official duties, abuses by diplomats can be substantially reduced. Although it may be difficult to define the scope of "official duties," once such a definition is forged, diplomats will be on notice that certain acts that violate the laws of the receiving state may be actionable. Prosecuting a diplomat for committing serious criminal offenses may interfere with the efficient functioning of that member within the diplomatic mission, but diplomatic immunity is designed

to protect the mission as a whole rather than its individual members. The individual may be replacable without seriously impeding the diplomatic mission. If prosecution is overly extensive and subjects United States diplomats abroad to undue reciprocal hazards, the State Department can, at a minimum, expel an offending foreign diplomat and force the sending state to recall him immediately or waive his immunity.

Over the years, abuse of diplomatic status, especially with regard to traffic violations and traffic accidents, has created severe public resentment. The mandatory insurance and direct action provisions that attempt to subdue this resentment are inadequate. At a minimum, higher mandatory insurance requirements are necessary. In addition, the sending state should take responsibility for paying any amount above and beyond the policy limits of the insurer.

Diplomatic immunity may be necessary, but to extend it without regard to the rights of those injured in the receiving state is unjustified. Abuses must be curtailed; such curtailment must begin with both the diplomat's individual compliance with local laws, and the sending state's efficient policing of its own diplomats abroad. Without these two safeguards, more severe and intrusive steps may be necessary to protect citizens of the receiving state, even if at the expense of the diplomat.

Robert A. Wilson